

NOT TO BE PUBLISHED

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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD JERRY HERNANDEZ et al.,

Defendants and Appellants.

E028908

(Super.Ct.No. FSB21414)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. James A. Edwards,
Judge. Affirmed.

Kevin C. McLean, under appointment by the Court of Appeal, for Defendant and
Appellant Edward Jerry Hernandez.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and
Appellant Anthony Hernandez.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Janelle Boustany, Supervising
Deputy Attorney General, and Robert B. Shaw, Deputy Attorney General, for Plaintiff and
Respondent.

Defendant and appellant Anthony Hernandez was charged with murder of Arthur Flores on January 9, 1999, in violation of Penal Code section 187, subdivision (1)¹ (count 1), as an accessory after the fact to a murder committed by defendant and appellant Edward Hernandez on January 7, 1999 in violation of section 32 (count 2), and possession of a controlled substance with a firearm on January 20, 1999 in violation of Health and Safety code section 11370.1, subdivision (a) (count 3). The information also charged defendant and appellant Edward Jerry Hernandez² with the murder of Joseph Ramon Caldera on January 9, 1999, in violation of section 187, subdivision (a) (count 4). The information alleged that each defendant personally used a handgun in the commission of the murders within the meaning of section 12022.53, subdivision (a), (c) and (d) and section 12022.5, subdivision (a)(1). The information further alleged that Anthony had a prior serious felony conviction within the meaning of sections 667, subdivision (a) and 1170.12, subdivisions (a) through (d), and 667, subdivision (b).

As to Anthony, the jury found him guilty of first degree murder, being an accessory after the fact to murder, and possession of a controlled substance with a firearm. The jury also found the gun use allegation to be true. As to Edward, the jury found him guilty of first degree murder and also found the gun use allegation to be true.

The trial court sentenced Anthony to a total term of 83 years and 4 months to life, and sentenced Edward to a total term of 50 years to life.

¹ All statutory references are to the Penal Code unless otherwise specified.

² For convenience, we will refer to defendants by their first names because they share the same last name. Collectively, they will be referred to as defendants.

On appeal, defendants contend that the trial court committed prejudicial error (1) in denying defendants' motion for severance of their trials, (2) in admitting gang evidence, and (3) in instructing the jury with CALJIC No. 17.41.1. None of defendants' contentions have merit. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Michael Hutto, a member of the Little Counts gang, was a methamphetamine dealer. Defendants, who are brothers, were methamphetamine dealers who obtained drugs from Hutto. Anthony was also a member of the Little Counts gang and Edward was a member of the Seventh Street Crazy Ones gang. Both gangs were sub-sets of the West Side Verdugo, or Mount Vernon, gang.

On January 7, 1999, Arthur "Tudy" Flores, also a Little Counts gang member, called Hutto and asked him if he was going to retrieve some methamphetamine which Flores was holding for Hutto. When Hutto arrived at a house owned by Flores' uncle, a party was going on. Defendants were present. Hutto saw Anthony talking to Joseph Caldera; Hutto did not know Caldera. Hutto introduced himself to Caldera as "Huero" from the Counts, and Caldera told him he was "Joe Boy" from Seventh Street, and threw a sign for the Seventh Street gang (also known as Calle Siete). A verbal fight erupted between Hutto and Caldera, each yelling the names of his gang. Then, Caldera said, "You want to trip," pulled a gun from his waistband, and shot Hutto in the stomach. As Hutto turned and ran, Caldera shot him several more times.

Hutto ran out of the house and jumped into a car in which Victoria Baca and others were seated. Hutto told Baca that he had been shot and asked her to take him to the hospital.

She refused. When Caldera caught up with Hutto, Caldera fired more shots at Hutto.

Thereafter, Hutto ran out of the car into a field. Hutto was shot in the back, fell into the field, and feigned being dead. After police arrived, Hutto told police that “Joe Boy” or “Joe Dog” had shot him, but was evasive about giving any other name.

In connection with the shooting, Flores was taken into custody. After being interviewed, Flores was released. While searching the Flores residence, detectives noted graffiti on the walls inside the house, which meant this was a house frequented by gang members.

Later that same day, Flores went to the home of his cousin, Anna Chagolla, who lived on North Arrowhead, near 9th Street, in San Bernardino. While he was there, Flores spoke with his sister, Tania Rivas, on the telephone. Flores told Rivas that he was going to a meeting, and if he did not call in three hours, something happened to him. A little while later, Flores spoke with his brother, Anthony Luque, on the telephone. Flores told Luque that he was going to a meeting, and that he would be back. While they were on the telephone, someone knocked on the door and Chagolla’s son answered it. The person asked for Tudy, Flores’ nickname. Flores walked to the door and spoke with the person. Thereafter, Flores returned to the telephone and told Luque, “I am going to go back out with the guys again, I am going to go back out with Anthony again.” Flores then left, telling Chagolla he would be back in a while.

Later that night, Flores’ body was found on North Arrowhead just south of 10th Street, about a block away from Chagolla’s house. He had been shot in the body and the head, including a shot behind his left ear.

Sylvia Chagolla, Anna Chagolla's daughter, testified that on the night of the incident, she and her friend were walking back to her house when she saw a car parked in front of her neighbor's house. Sylvia then heard gunshots. After the gunshots were fired, the car drove away. A woman was driving the car, and a man who looked like Anthony was in the passenger seat. Sylvia, however, had previously told the police that she did not see anyone on the street.

One day after Flores' death, Anthony told Marina Acosta, his former girlfriend and the mother of their daughter, that he enticed Flores out of the house by telling him he wanted to talk to him, then shot him about a block from the house. He showed her a gun, and told her it was the one he used to kill Flores. Prior to the shooting, he and Edward discussed who should shoot Flores. Anthony was chosen because he was in the same gang as Flores. Anthony stated that he had to shoot Flores because Flores told the police what had happened when Hutto was shot. Basically, defendants owed Hutto money for drugs. They intended to set up Hutto by trying to make the argument between Hutto and Caldera to appear "personal," so that an altercation would erupt and Hutto would be killed. They did not want to be connected to Hutto's shooting; they feared that Flores had told the police about their plan.

That night, Anthony, Acosta and their daughter spent the night at a motel with Edward and his girlfriend, Norma Rodriguez. While in the room, Edward expressed his intention to kill Caldera because Caldera shot Hutto.

The next morning, January 9, Anthony asked Acosta to help him find Caldera. Anthony stated that he needed to talk to Caldera because he wanted Caldera to trust Edward.

After they found Caldera, Acosta overheard their conversation. Anthony and Caldera agreed to go to a barbecue. Anthony and Acosta were to return to Acosta's house so that she could change her clothes, and Caldera was to leave with Edward. Acosta feared for Caldera's life because Anthony had told her that Edward planned to kill Caldera.

On that date, a barbecue was held at the apartment of Patrick Sanchez and Irene Hernandez. Anthony came with Acosta. Edward arrived with Caldera, but the two then left. Edward and Caldera picked up Edward's girlfriend, Norma Rodriguez, around 3:00 or 4:00 p.m. As they left, Edward was driving, Rodriguez was in the front passenger seat, and Caldera was in the back seat of the car. Just after they got on the freeway, Edward turned up the radio, then turned around and shot Caldera several times. Edward drove back to the barbecue, parked the car, and covered the body with his jacket. He told Rodriguez to "act normal." He said if she told anyone, he would kill her.

After a while, Edward left the barbecue in his car. When he returned, he told Rodriguez he had dumped the body at a church. Anthony helped Edward clean the car with shirts and bleach. They dumped the back seat of the car in a dumpster. They also attempted to clean up the blood by putting dirt on it.

According to Edward's testimony at trial, when he was in the car with Rodriguez and Caldera, Caldera, who had a gun, accused Edward of planning to shoot him. During the drive, Edward looked in the rear view mirror and saw Caldera reaching for his shirt. As he turned around with his own gun, he saw Caldera holding his gun. Frightened, he shot Caldera. Caldera's autopsy showed that he had significant amounts of methamphetamine and amphetamine in his system. Caldera's former girlfriend testified that Caldera had

become more aggressive and threatening as he used more methamphetamine. After the shooting, Edward returned to the barbecue. Thereafter, he left, intending to go to the police station. However, he changed his mind and went to church instead. He left the body at the church and said a quick prayer.

After the barbecue, Edward, Rodriguez, Anthony, Acosta and their daughter spent the night in a motel. Both defendants had guns. Edward said his was the gun he used to kill Caldera and that he killed Caldera because Caldera had shot Hutto.

After Acosta talked with the police, Anthony threatened her, including a threat that she would be killed. Edward threatened Rodriguez and her family after she spoke with the police. Edward denied threatening Rodriguez. When Anthony was arrested on January 20, the police found methamphetamine in his car and in his jacket pocket. The police also found a loaded handgun in the car.

San Bernardino police officer Michael Hamrick testified as a gang expert. He stated that Caldera might have shot Hutto so that Anthony and Edward would not have to account for unpaid drug money, and to make amends for previously giving information against the gangs. Caldera had previously provided information and testified about a gang killing. An attempt was made to murder another witness who testified in the same proceeding. Officer Hamrick also opined that Hutto was supplying drugs on behalf of the Mexican Mafia, a prison gang. If the Mexican Mafia wanted to have Hutto killed, it would have been accomplished within the gang. Officer Hamrick believed that the killings of Flores and Caldera were related to the Mexican Mafia.

A California Department of Corrections officer testified that Hutto had a money order made out to a Mexican Mafia member. Hence, he opined that the killings were ordered by the Mexican Mafia.

ANALYSIS

I. The Trial Court's Alleged Error in Denying Defendants' Motion

to Sever the Trial Was Harmless

Defendants contend that the trial court erred in denying their motion to sever their trials. Alternatively, to the extent that joinder was permissible, defendants argue that the trial court erred in failing to grant separate juries.

Section 1098 states that “[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials. . . .” The California Supreme Court has interpreted section 1098 “to mean that a defendant may not be tried with others who are charged with different crimes than those of which he is accused unless he is included in at least one count of the accusatory pleading with all other defendants with whom he is tried. [¶]

. . . Indeed, cases have consistently held that it is error to try together different defendants for different crimes unless at least one count of the accusatory pleading charges all the defendants with a single crime.”³

In this case, Anthony was charged in counts 1 through 3 with the murder of Flores, accessory after the fact to the murder of Caldera, and possession of a controlled substance

³ *People v. Ortiz* (1978) 22 Cal.3d 38, 43.

with a firearm. Edward was charged in count 4 with the murder of Caldera. Hence, defendants argue that a joint trial was improper because defendants were not jointly charged in any single count.

Alternatively, defendants argue that, to the extent the joinder was permissible, the trial court erred in failing to grant separate juries to defendants. “The use of dual juries is a permissible means to avoid the necessity for complete severance. The procedure facilitates the Legislature’s statutorily established preference for joint trial of defendants and offers an alternative to severance when evidence to be offered is not admissible against all defendants.”⁴

We, however, need not analyze whether the trial court erred (1) in denying defendants’ motion to sever, or (2) in failing to award separate juries during a joint trial because any error would have been harmless beyond a reasonable doubt.⁵

As to each defendant, the jury was instructed that evidence that was admitted against one defendant could not, and should not, be considered against the other. Moreover, the jury was instructed as follows: “Each count charges a distinct crime. You must decide each count separately. Each defendant may be found guilty or not guilty of any or all of the crimes for which he is charged. Your finding as to each count must be stated in a separate verdict.”

⁴ *People v. Cummings* (1993) 4 Cal.4th 1233, 1287, quoting *People v. Harris* (1989) 47 Cal.3d 1047, 1075. See also section 1098.

⁵ *Chapman v. California* (1967) 386 U.S. 18, 36 [87 S.Ct. 824, 17 L.Ed.2d 705].

Hence, the jury was told that they could only find either defendant guilty based on the evidence presented against that defendant. Jurors are presumed to be able to understand and follow instructions.⁶

Moreover, the evidence against each defendant was overwhelming.

As to Anthony, we fail to see how he could have achieved a more favorable result in a separate trial. Although Anthony argues that the evidence against him was “not overwhelming,” we disagree. Minutes before Flores was murdered, he told his brother that he was going out to meet Anthony. Moreover, Anthony confessed to Acosta that he had shot Flores because Flores had talked to the police about the Hutto shooting.

As to Edward, we fail to see how the joint trial was prejudicial. Rodriguez, who was in the car when Caldera was murdered, testified that Edward turned up the music in the car, turned around and shot Caldera numerous times.

Accordingly, we hold that any error in denying defendants’ motion to sever or request for separate juries was harmless beyond a reasonable doubt.

II. The Trial Court Properly Admitted Gang Evidence

Defendants contend that the trial court erred in permitting the prosecution to introduce gang evidence.

A. Standard of Review

“The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court’s decision exceeds the bounds of reason.

⁶ *People v. Williams* (1995) 40 Cal.App.4th 446, 456; *People v. Scott* (1988) 200
[footnote continued on next page]

[Citation.] Evidence of gang activity and affiliation is admissible where it is relevant to issues of motive and intent [citations], and, while admissible evidence often carries with it a certain amount of prejudice, Evidence Code section 352 is designed for situations in which evidence of little evidentiary impact evokes an emotional bias. [Citation.]”⁷

Typically, an abuse of discretion will not be found “except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]”⁸

B. The Trial Court Did Not Abuse Its Discretion in Admitting Gang Evidence

Gang evidence is admissible to show “gang affiliation and activity where such evidence is relevant to an issue of motive or intent.”⁹ Nothing bars evidence of gang affiliation that is directly relevant to a material issue.¹⁰

While California courts have long recognized the potential prejudicial effect of gang membership evidence, we have admitted such evidence when the very reason for the crime is gang related.¹¹ “Due to its potential prejudicial impact on a jury, our Supreme Court has condemned the introduction of ‘evidence of gang membership if only tangentially relevant, given its highly inflammatory impact.’ [Citation.] [¶] Of course, evidence of gang

[footnote continued from previous page]

Cal.App.3d 1090, 1095.

⁷ *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.

⁸ *People v. Jordan* (1986) 42 Cal.3d 308, 316, italics omitted.

⁹ *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.

¹⁰ *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588.

¹¹ *People v. Ruiz* (1998) 62 Cal.App.4th 234, 239.

membership should be excluded if the evidence is only relevant to prove a defendant's criminal disposition.”¹²

Here, we conclude the gang evidence was admissible because the evidence regarding the gang affiliations of both defendants and of the victims of the three shootings, Hutto, Flores and Caldera, was intertwined with the facts regarding the shootings and was essential to understand the context of the different shootings. For example, before shooting Hutto, Caldera “[threw] up the sign of Calle Siete,” and they exchanged words: “[Caldera] was saying Seventh Street and [Hutto] was saying Counts and [Caldera] was saying Seventh Street.” Hutto explained that, after such an exchange, he expected to have a fight with Caldera. Without the admission of the gang evidence, it would have been impossible to explain to the jury what had occurred prior to the shooting of Hutto. Moreover, because the subsequent shootings of Flores and Caldera were related to the shooting of Hutto, gang evidence was admissible to fully explain motives for the subsequent events.

This is precisely the point the trial court made in admitting the gang evidence:

“... [T]he cases that I have read, in any event, seem to indicate that where the crimes, the underlying crimes don't make a lot of sense, unless we have some explanation as to why such things happened, then usually those explanations involve the gang way of life, that it would not be improper and it would not be an abuse of discretion for the Court to allow such evidence to come in. I think that's what we have here.

¹² *People v. Ruiz, supra*, 62 Cal.App.4th 234, 240.

“We have three killings [*sic*] that I don’t think anybody can argue are totally independent and unrelated to each other. If we had no evidence as to how those killings [*sic*] are connected, it just doesn’t make a lot of sense. The killings [*sic*] apparently of all three individuals were related to gang activity, directions from the gang, and that evidence explains a lot of why it happened.

“On the other hand, I agree. Evidence of gang membership is, is inflammatory. It is prejudicial. To a certain extent, we’ll try to weed out those jurors who are so inflamed or affected by the mention of the word gang in the voir dire process we can eliminate hopefully those, but I’m not so naive as to think that that’s going to totally eliminate that problem. But balancing the evidence of gang membership against the probative value that such evidence would have on the issues of motive in particular and perhaps intent, I believe that the scales would tip in favor of admissibility.”

Under the totality of the circumstances of this case, we cannot say that the court exercised its discretion in an arbitrary, capricious or patently absurd manner.

Even if the trial court erred in admitting the gang evidence, an erroneous admission of gang evidence requires reversal only if it is reasonably probable that a result more favorable to the defendant would have been reached by the jury had the gang evidence been excluded.¹³ Here, we cannot say either defendant would have achieved a more favorable result had the gang evidence been excluded.

¹³ *People v. Cardenas* (1982) 31 Cal.3d 897, 910.

As to Edward, he admitted that he shot Caldera: “There is no question in this case that [Edward] shot and killed Caldera. The issue for the jury was whether [Edward] shot in self defense when Caldera pointed a gun at him, or whether it was planned by [Edward].” However, as discussed above, Rodriguez, who was in the car when Caldera was murdered, testified that Edward turned up the music in the car, turned around and shot Caldera numerous times. We fail to see how excluding the gang evidence would have changed the jury’s verdict. Moreover, when a defendant relies on a theory of self-defense and presents evidence of the victim’s violent character, the prosecution has the right to counteract this evidence by presenting evidence of the defendant’s violent character.¹⁴ Here, Edward introduced evidence of Caldera’s violent tendencies to bolster Edward’s self-defense theory. Therefore, the prosecution could present evidence of defendant’s violent character with the gang related evidence.

As to Anthony, we also fail to see how excluding gang evidence would have resulted in a more favorable verdict. The evidence against Anthony was overwhelming: Anthony confessed to Acosta that he had killed Flores, and Flores had told his brother over the telephone, just before he went out the evening he was murdered, that he was going to see Anthony.

Hence, not only was there no error by the trial court in admitting gang evidence during the trial, any error was harmless.

¹⁴ Evidence Code section 1103, subdivision (b); *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173-1174.

III. The Trial Court Properly Instructed the Jury with CALJIC No. 17.41.1

Defendants contend that the trial court improperly instructed the jury with CALJIC No. 17.41.1¹⁵ because the instruction interferes with the jury's power of nullification and by improperly chilling freedom of expression during deliberations. Although the validity of this instruction is still pending before the Supreme Court,¹⁶ we believe it is proper.

First, we reject defendants' argument that the instruction interferes with the jury's right to nullify. A unanimous Supreme Court recently rejected the concept of a right to jury nullification in *People v. Williams*.¹⁷ The court, however, expressly declined to determine the validity of the instruction.¹⁸ After an extensive review of the debate surrounding jury nullification, the court concluded: "Jury nullification is contrary to our ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law. . . . [¶] We reaffirm, therefore, the basic rule that jurors are required to determine the facts and render a verdict in accordance with the court's instructions on the law."¹⁹ The

¹⁵ CALJIC No. 17.41.1, as given to the jury in the instant case, states as follows: "The integrity of a trial requires that jurors[,] at all times during their deliberations[,] conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."

¹⁶ See *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted April 26, 2000, S086462.

¹⁷ *People v. Williams* (2001) 25 Cal.4th 441.

¹⁸ *People v. Williams*, *supra*, 25 Cal.4th 441, 446, footnotes 3 and 8.

¹⁹ *People v. Williams*, *supra*, 25 Cal.4th 441, 463.

instructions given here did no more than require the jurors to fulfill their proper duties under this “basic rule.”

We also reject defendants’ other contention that CALJIC No. 17.41.1 chilled the freedom of expression during deliberations. CALJIC No. 17.41.1 simply directs the jury to report improprieties in the deliberative process that would constitute jury misconduct and would compromise the defendant’s right to a fair trial. The instruction is merely a restatement of law found in other standard instructions, including CALJIC Nos. 1.00, 1.03 and 17.43. The trial court has an obligation to inquire into any alleged violation of jury instructions, and such an inquiry does not infringe on the privacy or the deliberative process of the jury.²⁰ Moreover, statements made by jurors in the process of their deliberations are admissible into evidence, not to show their thought processes, but for the purpose of demonstrating misconduct. Misconduct is a ground for dismissing a juror.²¹

Hence, we conclude that merely instructing jurors that the court may be informed of jury misconduct is not unlawful or unconstitutionally intrusive. Defendant has failed to show that the challenged instruction was in any way erroneous.

²⁰ *People v. Cleveland* (2001) 25 Cal.4th 466, 481; *People v. Jenkins* (2000) 22 Cal.4th 900, 985; *People v. Hayes* (1999) 21 Cal.4th 1211, 1255; *People v. Williams* (1997) 16 Cal.4th 153, 230-232; *People v. Davis* (1995) 10 Cal.4th 463, 547.

²¹ Penal Code, section 1089; *People v. Daniels* (1991) 52 Cal.3d 815, 864; *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333.

DISPOSITION

The judgment is affirmed.

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/s/ Ward
J.

We concur:

/s/ Hollenhorst
Acting P. J.

/s/ Gaut
J.